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IN THE

Supreme Court of the United States

No. 70-36

CHARLES R. PERRY, *et al.*,
Petitioners,

v.

ROBERT P. SINDERMANN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

The National Education Association of the United States (NEA), with the consent of the parties, appears before this Court as *amicus curiae* in the present case.[1] When this case was pending before this Court on petition for a writ of certiorari, NEA appeared as *amicus curiae* to urge that the writ of certiorari be granted. At the present stage of the proceedings, NEA appears, as it did in the court below, as *amicus curiae* in support of the position taken by respondent.

[1] Letters from counsel for each of the parties, consenting to NEA's participation as *amicus curiae*, have been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE*

NEA was founded in 1857 and chartered as a nonprofit corporation by act of Congress in 1906. Its membership includes more than one million professional educators, many of whom are nontenured teachers.

NEA has long sought protection for the constitutional rights and academic freedom of educators, including due process in matters pertaining to their appointment, promotion, dismissal and nonretention. To this end, NEA has participated as *amicus curiae* before this Court and before other federal and state courts in other teacher termination cases raising First Amendment[2] and procedural due process issues[3] comparable to those raised in the present case. For these reasons, NEA appears here as *amicus curiae* in support of the respondent.

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[2] *See* Jones v. Hopper, 397 U.S. 991 (1970), *denying cert. to* 410 F.2d 1323 (10th Cir. 1969); Fenton v. Boston School Comm., 401 U.S. 929 (1971), *dismissing appeal from and denying cert. to* DeCanio v. School Comm. of Boston, 260 N.E.2d 676 (Mass. 1970); O'Neil v. Board of Educ., Dkt. No. 693-70, 10th Cir. (pending on appeal *en banc*); Fooden v. Board of Govs., 268 N.E.2d 15 (Ill. 1971), *modified upon denial of rehearing*, Mar. 31, 1971, *petition for cert. filed*, 40 U.S.L.W. 3002 (U.S. June 29, 1971) (No. 1901, *renumbered*, No. 70-354).

[3] *See* Orr v. Trinter, 40 U.S.L.W. 3081 (U.S., filed Aug. 18, 1971) (No. 71-249), *on petition for cert. from* Dkt. No. 20721, 6th Cir., June 16, 1971, *reversing* 318 F. Supp. 1041 (S.D. Ohio 1970); Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970), *cert. denied*, 402 U.S. 972 (1971); Roth v. Board of Regents, 40 U.S.L.W. 2060 (7th Cir. July 1, 1971), *affirming* 310 F. Supp. 972 (W.D. Wisc. 1970), *petition for cert. filed*, 40 U.S.L.W. 3069 (U.S. Aug. 3, 1971) (No. 71-162); McDowell v. State of Texas, Dkt. No. 30,363, 5th Cir. (pending on appeal *en banc*).

INTRODUCTION AND SUMMARY OF ARGUMENT

NEA is in agreement with the legal positions presented in respondent's brief. Accordingly, this *amicus* brief is limited to the presentation of relevant historical materials and recent empirical research data which should be of assistance to this Court in considering the constitutional issues presented.

In Part I of its argument, NEA shows that the present case is representative of a longstanding and continuing pattern of retaliation against teachers for exercising basic constitutional rights. Historical data shows that, from the earliest days of our nation through the present day, school authorities on all levels have felt free to terminate the employment of teachers for espousing unpopular causes offensive to the school administration, to the prevailing view in the community, or to powerful political or economic interests.

Survey data have shown that many teachers have been fearful of exercising even the most elementary rights of citizenship. The consequences extend beyond the curtailment of fundamental rights of the large number of individuals involved. All of society suffers when educators are denied "that free play of the spirit which all teachers ought especially to cultivate and practice...." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion). Nor is it in the public interest to deny full participation in public debate to teachers who have insights and knowledge to contribute on the critical issues of the day, particularly on those relating to educational policy. *See Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968). Accordingly, this Court should hold that the renewal of respondent's contract could not be conditioned upon the relinquishment of his constitutional rights. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 605-606 (1967).

In Part II, NEA addresses particular aspects of the procedural due process issue. It first shows that, if a school system terminates *one* teacher's employment without an opportunity for defense, there is an inevitable chilling effect

on free expression by *all* teachers in that system. Procedural due process has the prophylactic effect of making school authorities accountable for their actions, thereby discouraging and preventing arbitrary action. NEA further provides empirical data from its Research Division's recent study of *School-Board Procedures Upon Nonrenewal of Teachers' Contracts* (Sept. 1971) (Research Memo 1971-27) supporting respondent's argument that procedural due process is necessary to protect a teacher's professional reputation and his ability to pursue his chosen occupation. Finally, NEA analyzes state statutory provisions and empirical data from recent research studies to show that due process procedures would impose no significant administrative burden on school authorities.

ARGUMENT

I. THE HISTORY OF REPRISALS AGAINST TEACHERS WHO HAVE EXERCISED THEIR CONSTITUTIONAL RIGHTS AS CITIZENS COMPELS REAFFIRMATION BY THIS COURT THAT A NONTENURED TEACHER CANNOT BE DENIED REEMPLOYMENT FOR EXERCISING SUCH RIGHTS.

Respondent Sindermann alleges that his contract was not renewed in retaliation for his activity in favor of two causes, and his support of legislation necessary to achieve those goals. In both cases, the Board of Regents of Odessa Junior College maintained positions contrary to those espoused by Sindermann. The Board's opposition to the two causes supported by Sindermann and its attempts to silence him as a source of irritation fall within the historical pattern of suppression by school administrations of the views of dissident faculty members.

Sindermann's first aim was to secure to the teachers of the public colleges of Texas, through legislative enactment, the protections of tenure and academic freedom. Obviously, such legislation was opposed to a vested interest of the Board—the arbitrary discretion to withhold renewal of the

contract of a teacher for any reason or no reason. The bill in question would have limited the Board's power. Board members, like superintendents of schools, "being human, cherish their power over others and know that adequate tenure laws will deprive them of the more arbitrary exercises of it."[4]

Sindermann's second project was to obtain the elevation of Odessa Junior College to full four-year status. This, too, clearly conflicted with the stated policy of the Board. It is not clear from the record why the Board opposed four-year status for the college, but economic interests appear to have played a role. Not only the Board of Regents, but also the chambers of commerce of Odessa and Midland appear to have taken stands contrary to Sindermann's goals (*see* Resp. Br. App. 16a-17a).

History shows many instances of a teacher silenced through arbitrary dismissal or the threat of dismissal when his public comments endangered the interests or philosophies of school authorities or the economic or political forces having influence or control over the schools. A few years ago, this Court confronted such a case in *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* case and the present case are only recent manifestations of a long-standing and continuing pattern of retaliation against teachers for exercising basic constitutional rights.

From the earliest days of our nation, teachers have been at the mercy of school and university boards and administrations that have felt free to terminate their employment for embracing unpopular causes offensive to the school authorities, to the prevailing view in the community, or to powerful

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[4]H.K. Beale, *Are American Teachers Free?* 475 (1936) (hereinafter referred to as "I Beale"). This work and Professor Beale's companion volume, *A History of Freedom of Teaching in American Schools* (1941) (hereinafter referred to as "II Beale") are parts XII and XVI, respectively, of the *Report of the Commission on the Social Studies* of the American Historical Association.

political or economic interests.[5] This practice achieved doctrinal support during the Jacksonian period when the "spoils system" became an entrenched feature of American politics. The Jacksonian democrats believed that, since all men were politically equal, any man could fill any office or position. This concept was quickly adapted to the field of education:

> "Training for teaching was as unnecessary as training for political office. Political appointments were rewards for friendship or for service that had nothing to do with qualification for the tasks. Teaching, too, came to be looked upon as the perquisite of 'worthy' members of the community, who needed support and had powerful friends. . . . There was no reason why a place so acquired should not again be taken from a man when he lost public approval. A teacher employed under these terms could scarcely attain a professional attitude that would make him free."[6]

Acceptance of the spoils system in education was bipartisan in nature. For example, at Kansas State Agricultural College, the state-wide victory of Democrats and Populists in 1896 resulted in the termination of all faculty contracts. Many of the professors were rehired, but the Populist victors staffed the presidency and the department of economics with men of acceptable ideologies. When, in 1899, the Republicans returned to power, they recaptured these prizes.[7]

Virtually any issue on which men might disagree could underlie a teacher's termination if the disagreement was between him and his superiors or his views conflicted with powerful interests controlling the schools. Before the Civil War, teachers in the South incurred dismissal for questioning the institution of slavery.[8] In 1859, for example, the entire

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[5] *See, e.g.*, I Beale 464-65; II Beale 60, 149, 203, 228.

[6] II Beale 75.

[7] *See* R. Hofstadter & W.P. Metzger, *The Development of Academic Freedom in the United States* 424-25 (1955) (hereinafter referred to as "Hofstadter & Metzger").

[8] *See* II Beale 145-50.

faculty of Berea School in Kentucky was driven out for advocating abolitionism.[9] Following the Civil War, when business interests gained control of education in the South, a teacher's criticism of the "new industrial slavery" was no less hazardous to his employment.[10]

Northern business interests also sought to prevent discussion of the abuses of industrialization. For example, the liberal remarks of a professor at the University of Chicago about the Pullman strike embarrassed the university's president, who complained: "It is hardly safe for me to venture into any of the Chicago clubs." The contract of the offender was not renewed at year's end without a hearing or the specification of charges.[11]

The question of free silver was another issue on which a professor's orthodoxy determined his longevity. Near the turn of the century, the president of Brown University was offered the option of accepting the trustees' views on free silver or resigning.[12] The issue of academic freedom in this Hobson's choice was ignored by the press. Commented the *New York Mail and Express*: "'This was not a blow at free speech, but a recognition of the absurdity of a free-silver champion drawing a salary from a sound-money corporation for teaching the students that which the supporters of the university condemned as pernicious and dangerous.'"[13] A generation later, a teacher in Colorado was forced to sign, contrary to her convictions, a petition in favor of free silver under threat of dismissal.[14]

During World War I, there were wholesale attempts to purge from all schools those teachers who even suggested opposition to the war, support for Germany, or pacifism.

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[9] II Beale 149.

[10] I Beale 132-33.

[11] Hofstadter & Metzger 427-28.

[12] II Beale 229.

[13] Quoted at *id.*

[14] I Beale 141-42.

Many teachers were dismissed or denied promotion because their support of the war was insufficiently ardent.[15]

In the depression era, teachers felt that, if they did not conform, if they expressed their own opinions, if they criticized the authorities, or if they incurred the slightest official displeasure, they were marked for dismissal or non-renewal—and destined to enter the ranks of the unemployed—when the next "economy" move came.[16]

Between world wars, when the spectre of communism and radicalism haunted America, teachers who were suspected of even the slightest divergence from patriotic orthodoxy were in danger of being purged from the system. "In Centralia, Washington, the School Board . . . barred from the schools all persons whom the Superintendent did not deem 'one-hundred per cent Americans.'"[17] In Cleveland, the supervisor of the social science curriculum in the public schools, described by the Superintendent as "'a perfect corker of a teacher,'" was nevertheless not reappointed. His transgression had been to remark, during an otherwise anti-Soviet speech at a hotel luncheon served by strikebreakers, that "among the liberties that did not exist in Russia was the liberty of being served by strike-breakers in a leading hotel."[18]

A comparable hysteria arose during the McCarthy era in the early and mid-1950's. The search for alleged domestic communist conspiracies quickly extended to the public schools:

> "Taking advantage of this outbreak of fear, experienced right wing leaders distributed vast amounts of literature claiming that most teachers and textbooks were advocates of socialism. A substantial number of public school teachers were fired, many of them

[15] *See* 1 Beale 25-35.

[16] II Beale 267. "Economy" is equally likely to serve as a subterfuge for a reprisal against nonconforming teachers in the present era of school budget austerity.

[17] I Beale 100.

[18] I Beale 150-51.

summarily on the basis of unsubstantiated and frequently anonymous accusations of disloyalty."[19]

The fear generated had an obvious chilling effect on teachers' free expression:

> "There was a definite decline in intellectual and academic freedom. . . . Many teachers withdrew from participation in social, political and economic associations and discussions. Some admitted they resorted to precautionary devices in classrooms and in their writings to allay criticism, censure and the threat of dismissal. . . ."[20]

Pressures akin to those of the McCarthy era continued to inhibit teachers during the 1960's. The ACLU identified the source of these influences as "self-constituted 'patriotic' societies and groups":

> "College teachers once more are being criticized for adopting and supporting so-called controversial positions, personally and professionally. They are being accused of aiding and abetting students who are regarded as rebels. Demands for punishment and dismissal of teachers are becoming frequent and are sometimes heeded by college administrators."[21]

In recent years, as the findings of courts confirm, teachers continue to be dismissed, suspended or not reemployed because of their criticism of school authorities. In *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), a teacher was dismissed for writing a letter to a newspaper editor attacking the school board's handling of proposals to raise new school revenues and its allocation of resources between educational and athletic programs. In *Armstead v. Starkville Mun. Sep. School Dist.*, C.A. No. EC 70-51-S, N.D. Miss., July 27, 1971, a black teacher was not reemployed because she cir-

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[19] H. Ziegler, *The Political Life of American Teachers* 121 (1967).

[20] ACLU, *Academic Freedom, Academic Responsibility, Academic Due Process in Institutions of Higher Learning* 4 (rev. ed. 1966).

[21] *Id.* at 5.

culated documents criticizing alleged racial discrimination by school authorities against black educators. In *Puentes v. Board of Educ.*, 24 N.Y.2d 996, 250 N.E.2d 232 (1969), *on remand from* 392 U.S. 653 (1968), a high school teacher was suspended without pay for distributing to his fellow teachers copies of a letter he had written to his school board critical of the board's failure to renew the contract of a probationary teacher. In *Downs v. Conway School Dist.*, C.A. No. LR-70-C-160, E.D. Ark., June 23, 1971, a teacher's contract was not renewed because she exercised rights of free speech and petition in criticizing various policies of the school administration. In *Roberts v. Lake Central School Corp.*, 317 F. Supp. 63, 65 (N.D. Ind. 1970), a teacher's contract was not renewed because of his criticism of the school administration during collective negotiations. A similar fate befell a teacher in *Chase v. Fall Mountain Regional School Dist.*, C.A. No. 3112, D.N.H., July 28, 1971. In *McGee v. Richmond Unified School Dist.*, 306 F. Supp. 1052, 1053 (N.D. Cal. 1969), three nontenured school community workers were denied reemployment because of their signatures on a petition urging defeat of a limited tax increase sought by the school board because the board "had not addressed itself to the needs of the black community in its campaign." *See also Jackson v. United States*, 428 F.2d 844, 846 (Ct. Cl. 1970); *Los Angeles Teachers Union v. Los Angeles City Board of Educ.*, 78 Cal. Rptr. 723, 455 P.2d 827 (1969); *Lucas v. Chapman*, 430 F.2d 945, 948 (5th Cir. 1970); *Friedman v. Union Free School Dist. No. 1*, 314 F. Supp. 223 (E.D. N.Y. 1970); *Rainey v. Jackson State Coll.*, 435 F.2d 1031 (5th Cir. 1970).

Surveys have shown that many teachers have been fearful of exercising even the most elementary rights of citizenship, such as criticizing the President or exposing local corruption.[22] However limited the teacher's freedom to express

[22] In San Francisco a principal was dismissed for providing a grand jury with evidence of school graft. I Beale 356. *See also* I Beale 82. Beale notes that the survey he conducted indicated that "[c]riticism of the Government is dangerous. One teacher out of three was afraid

such views in class, "[t]here is much less freedom in advocating these same things outside of class. . . ."[23] Teachers are particularly inhibited from publicly expressing criticism of local government officials. Only 58 per cent of those in a recent survey considered this a proper activity in which to engage, suggesting that teachers are wary of offending those in a position to interfere with the continuity of their employment.[24] Thus, a profession ideally intended to stimulate thought and the exchange of ideas is apparently bartering its birthright for security:

> "Indifference to civic problems and general colorlessness are assets in seeking a teaching position, unless one can be conventional in his civic views. This is all significant not only for its effect upon the choice of teachers but for its important though unconscious influence upon the views and conduct of those who do get chosen for teaching positions."[25]

As a consequence of the stifling of freedom within the teaching profession, those to whom the rights of free expression are of indispensable importance—those likely to be our most effective teachers—may well avoid the teaching profes-

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even to criticize President Hoover for using the army to drive the bonus men out of Washington or to accuse state officials of corruption. It is more dangerous, however, to express censure of the President of the United States on other grounds, or of local courts for unjust decisions, or of local officials for corruption." II Beale 240.

[23] II Beale 242.

[24] H. Zeigler, *The Political Life of American Teachers* 97 (1967).

[25] I Beale 521. Under these circumstances, one may doubt whether the following assessment of the condition of unprotected professors at American universities in the nineteenth century has any less validity today (Hofstadter & Metzger 232):

> "The least enterprising and self-assertive, often the least able, members of an inferior faculty were those most likely to remain docile in their jobs under intolerable pressures. Any profession is in a bad way when its members can seek freedom most effectually by leaving it. . . . Professors suffered, but their students and the community often bore the greater share of the loss."

sion entirely. Almost fifty years ago, NEA, seeking to encourage the passage of tenure legislation, expressed this very concern. It noted that, in a series of politically motivated teacher dismissals, "the hazards of the teaching profession have been emphasized, the work of the teacher discounted and fine, highminded youth discouraged from entering it."[26]

It is of obvious importance that "society may have the benefit of honest judgment and independent criticism [by teachers] which otherwise might be withheld because of fear of offending a dominant social group or transient social attitudes."[27] Mr. Justice Frankfurter recognized this ideal in his concurring opinion in *Wieman v. Updegraff*, 344 U.S. 183, 196 (1952):

> "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. . . . They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them."

Of comparable importance to the community is to encourage teachers to participate in public debate. Teachers have insights and knowledge to contribute to the issues of the day, particularly those relating to educational policy. As this Court recognized in *Pickering v. Board of Educ.*, 391 U.S. 563, 572 (1968):

> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."

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[26] NEA, *The Problem of Teacher Tenure*, 2 NEA Research Bull. 137, 145 (1924).

[27] C. Byse & L. Joughin, *Tenure in American Higher Education* 4 (1959).

For the foregoing reasons, this Court should reaffirm its decisions, and uphold the conclusion of the court below, that school authorities may not refuse reemployment to a teacher—whether tenured or non-tenured—in retaliation for the exercise of a constitutional right. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 605-06 (1967).

II. THIS COURT SHOULD REQUIRE PROCEDURAL DUE PROCESS SAFEGUARDS TO PROTECT NONTENURED TEACHERS IN THE EXERCISE OF THEIR CONSTITUTIONAL RIGHTS AND TO PREVENT ARBITRARY TERMINATION OF THEIR EMPLOYMENT.

A. Procedural Due Process Is Necessary To Provide "Bulwarks" Against the Infringement of Teachers' Rights.

The lack of procedural safeguards against the arbitrary termination of a teacher's employment has a chilling effect upon the teaching community. If a school system is free to terminate a teacher's employment without affording him a readily available opportunity to defend himself in a fair hearing, few in the academic community will be willing to indulge in "that free play of the spirit which all teachers ought especially to cultivate and practice. . . ." *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion); *see, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968).

In 1907, President Charles W. Eliot of Harvard stated in his Phi Beta Kappa address on *Academic Freedom* (at p. 2) that "so long as . . . boards of trustees of colleges and universities claim the right to dismiss at pleasure all the officers of the institutions in their charge, there will be no security for the teachers' proper freedom. . . ."[28] Recently, the Seventh Circuit voiced similar recognition that the requirement of a hearing for a nontenured teacher on the proposed nonrenewal of his contract "serves as a prophylactic

[28] Quoted at Hofstadter & Metzger 398.

against non-retention decisions improperly motivated by exercise of protected rights." *Roth v. Board of Regents*, 40 U.S.L.W. 2060 (7th Cir. July 1, 1971), *petition for cert. filed*, 40 U.S.L.W. 3069 (U.S. Aug. 3, 1971) (No. 71-162).[29]

School officials accustomed to wielding arbitrary power will think twice before taking improperly motivated actions which they know will be exposed to public scrutiny. A requirement of a fair hearing promotes accountability by forcing school officials to act responsibly and with justification based on the teacher's record before moving to deprive him of his livelihood.[30]

An example of the arbitrary way in which school authorities may act to terminate a teacher's employment was provided in *Chase v. Fall Mount. Reg. School Dist.*, C.A. No. 3112, D. N.H., July 28, 1971, where a teacher was denied reemployment as the result of unsubstantiated rumors and complaints which the board did not bother to investigate or verify (*see* Resp. Br. 37 n.22).

A similar case in which a board acted on the basis of mere complaints without further investigation is recounted by Professor Beale:

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[29] This Court should bear in mind that the present case is not typical. It is rare that school authorities manifest the degree of candor present here. A fair reading of the college's press release (A. 12-23) lends a high degree of credence to Sindermann's allegations that petitioners refused to renew his contract in retaliation for "his exercise of First and Fourteenth Amendment rights of expression, association and petition" (A. 186). In contrast, in most contract nonrenewal cases arising in the courts, the school authorities either have given no reasons or have provided reasons allegedly pretextual in nature, serving to mask constitutionally impermissible reasons. *See, e.g., Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). Or the reasons given may be challenged as arbitrary or wholly without factual basis. *See, e.g., Shirck v. Thomas*, Dkt. No. 18790, 7th Cir., Sept. 2, 1971, *reversing* 315 F. Supp. 1124 (S.D. Ill. 1970).

[30] *Cf.* O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 Sup. Ct. Rev. 161, 184-90.

> "When . . . [the teacher's] reappointment came up . . ., several members of the Board raised the question why they should keep a man about whom there was discussion and criticism. The Board did not investigate to see if there was valid ground for criticism; it felt the criticism itself was sufficient reason for dismissal."[31]

In explaining his vote for nonrenewal, one member of the Board stated: "'The other men said they heard complaints and I took their word for it.'"[32] This nonrenewal occurred in a rural area to which the state tenure law did not apply. Therefore, this procedure was "legal" as well as "customary."[33]. *See also Downs v. Conway School Dist.*, C.A. No. LR-70-C-160, E.D. Ark., June 23, 1971, in which the court in condemning the arbitrary nonrenewal of a teacher's contract for the exercise of constitutionally protected rights noted the "highly malevolent attitude" of the defendant school officials (Slip Op. 19).

It is clear from these examples that, as the Fifth Circuit noted in *Hornsby v. Allen*, 326 F.2d 605, 610 (1964), "absolute and uncontrolled discretion invites abuse." As that court stated (*id.*):

> "The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward insuring that these expectations are realized is to require adherence to the standards of due process. . . ."

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[31] I Beale 157.

[32] Quoted at I Beale 156.

[33] I Beale 156 n. 135.

B. Procedural Due Process Is Necessary To Protect a Teacher's Professional Reputation and His Ability To Pursue His Chosen Occupation.

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), this Court held that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Nonrenewal of a teacher's contract adversely affects his professional reputation and his ability to pursue his profession. This is especially true today when a teacher whose employment is under any cloud is at a severe competitive disadvantage as a result of a burgeoning teacher surplus[34] and the increasing tendency of communities faced with proliferating budgetary demands to curtail educational outlays.[35]

As respondent has noted (Resp. Br. 38-41), courts and educators alike have recognized the harm caused a nontenured teacher by the nonrenewal of his contract. In addition to the cases cited by respondent, NEA directs the Court's attention to *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio 1970), *reversed*, Dkt. No. 20721, 6th Cir., June 16, 1971, *petition for cert. filed*, 40 U.S.L.W. 3081 (U.S. Aug. 18, 1971)(No. 71-249). The district court in *Orr* characterized the protectible interests of the nontenured teacher involved as "professional standing and reputation" (318 F.Supp. 1045) and the "ability to pursue [a] chosen profession" (*id.* at 1046). These interests are "separate and apart from any interest in a particular job" (*id.* at 1045) and "[i]ndisputably" are in danger of being damaged when a contract is not renewed (*see id.* at 1046). On the basis of this analysis, the court held (*id.*):

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[34] *See* NEA Research Div., *Teacher Job Shortage Ahead*, 49 NEA Research Bull. 69 (1971).

[35] *See* Educational Research Service, *School Bond and Budget or Tax Rate Referendums, 1970*, ERS Inf. Aid No. 10, Aug., 1971.

> "[T]he interests of the school board and those of the teacher will both be fully protected by a procedure which advises the nontenured teacher of a proposed purpose not to renew his contract and affords him a hearing at which the legitimacy of the reasons compelling such action is determined."

In *Orr*, the court had noted that the plaintiff had been requested to resign prior to his being informed of the nonrenewal of his contract. From this fact, the court reasoned (*id.* at 1045):

> "The clear inference is that plaintiff would have benefitted by resigning, rather than having board action shown on his record. The only conceivable benefits are plaintiff's professional standing and the effect of a public discussion on his professional reputation."

Although the decision in *Orr* was reversed on appeal, the appellate court did not disturb this finding. The district court's observations in *Orr* are borne out by a recent survey of procedures utilized in the nonrenewal of teachers' contracts conducted by NEA's Research Division. The survey was of a stratified sample of 11,717 public school systems throughout the United States.[36] The school systems were asked to indicate their usual procedures on resignations before and after formal notice to teachers that their contracts would not be renewed on expiration. The data showed that in 9 out of 10 school systems "teachers are given a chance to resign in advance of formal notice of contract nonrenewal, whether the opportunity to resign is self-initiated or on recommendation of the school authorities" (App. 4a-5a). In almost half of these systems (47 percent) resignation is affirmatively recommended to the teacher by the school officials. Obviously, school systems would not follow such a policy unless they believed that teachers would consider re-

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[36] Relevant portions of the NEA Research Memo, *School-Board Procedures Upon Nonrenewal of Teachers' Contracts* (Sept. 1971) are set forth in the Appendix to this brief.

signation as a valuable option in protecting their professional reputation and standing.

C. Empirical Evidence Shows That Due Process Procedures Would Impose No Significant Burden on School Administrators and Boards.

Any notion that the provision of *hearings* would impose overly burdensome administrative inconvenience has no empirical support, the suggestion to the contrary in the *Drown* case notwithstanding. *Drown v. Portsmouth School Dist.*, 435 F.2d 1182 (1970), *cert. denied*, 402 U.S. 972 (1971).

With respect to the teacher's interest in having a *statement of reasons* for the contract nonrenewal, the court in *Drown* observed that "[f]rom the viewpoint of the school board, a requirement that it state its reasons for not rehiring a non-tenured teacher would impose no significant administrative burden. Nor would it significantly inhibit the board in ridding itself of incompetent teachers" (435 F.2d at 1185). Citing Section 14.20.180(a) of the Alaska Statutes and Section 28.67.070 of the Washington Revised Code Annotated, the court noted that "several states presently require their school boards" to provide a written statement of reasons for nonretention, and that therefore this was evidence of "the workability of such a requirement" (*id.* at 1185 & n. 6).

The First Circuit took the opposite approach to the need for an adjudicatory *hearing*. The teacher had argued that "the right to a statement of the reasons for not being rehired is meaningless unless the school board can be forced to prove those reasons at a hearing" (*id.* at 1185). The court noted that the hearing called for by the teacher "would involve the full trappings of counsel, cross-examination, rules of evidence [and] a verbatim record." Rejecting such a requirement, the court maintained, *inter alia*, that "the invoking of such adjudicative apparatus

[would] be an added, expensive and unfamiliar obligation of the school district" (*id.* at 1185-86).

The First Circuit's characterization of the requirement of a trial-type hearing as an unmanageable administrative burden "is clearly refuted by actual practices in this country" (Resp. Br. 43). Aside from statutes in 45 states and the District of Columbia which require a statement of reasons and a hearing before the employment of *tenured* teachers can be terminated (*see* Resp. Br. 43 n.29), statutes of 18 states[37] require some form of procedural due process prior to the nonrenewal of a *nontenured* teacher's contract.[38]

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[37]The 18 states and their statutory provisions are as follows:

Alaska: Alaska Stats., tit. 14, §§ 14.20.140-45, 14.20.175-80 (1971)

Arkansas: Ark. Stat. Ann., ch. 74, § 80-1304 (1970)

California: Calif. Educ. Code §§ 13404-40, 13442-43 (Deering 1969)

Connecticut: Conn. Gen. Stat., tit. 10, § 10-151 (Supp. 1969)

Delaware: Del. Code Ann., tit. 14, §§ 1401-14, 1420 (Supp. 1970)

Indiana: Ind. Stats. Ann. §§ 28–4307-08, 28–4312 (Burns 1948)

Iowa: Iowa Code Ann., tit. 12, §§ 279.13, 279.24 (1949, Supp. 1971)

Kentucky: Ky. Rev. Stats. §§ 161.750, 161.790 (Baldwin 1969)

Minnesota: Minn. Stats. § 125.12 (1965)

Missouri: Mo. Rev. Stats. § 168.111 (Supp. 1967)

Nebraska: Neb. Rev. Stats. § 79-1254 (1966)

Nevada: Nev. Rev. Stats. §§ 391.312–.3197 (1967)

North Dakota: N. Dak. Cent. Code §§ 15-47-27, 15-47-38 (Supp. 1969)

Oregon: Ore. Rev. Stats. §§ 342.508-13, 342.530 (1969)

Rhode Island: R. I. Gen. Laws §§ 6-13-2, 6-13-4 (1969, Supp. 1970)

Texas: Tex. Code Ann. § 21.201-16 (1969)

Washington: Wash. Rev. Code §§ 28A.67.070, 28A.58.450-.515 (Supp. 1970)

Wisconsin: Wisc. Stats. § 118.22 (1969) (as modified by the *Roth* decision)

[38]For a complete summary of all the state statutory provisions, *see* NEA Research Div., *Teacher Tenure and Contracts* (1971) (Research

Four of these states—Arkansas, Iowa, North Dakota and Washington—make no distinction between tenured or nontenured teachers and require the same type of procedures for all teachers. Four others—Oregon, Minnesota, Nebraska and Wisconsin—require such procedures only for certain school systems within the state.

In 12 of the 18 states—Alaska, Arkansas, California, Connecticut, Iowa, Nebraska, Nevada, North Dakota, Rhode Island, Texas, Washington and Wisconsin—a nontenured teacher has a right to both a statement of reasons *and* a hearing with respect to the nonrenewal of his contract. In the other six states, the teacher has a right only to a statement of reasons for the nonrenewal.[39]

Rep. 1971-R3). For an analysis of these provisions, *see* NEA Research Div., *Statutory Hearing Rights of Nontenured Teachers*, 49 NEA Research Bull. 17, 18-20 (1971).

[39] All of the 18 states require procedural due process for mid-term dismissal of nontenured teachers as well. Eight other states also accord nontenured teachers a right to a statement of reasons and a hearing prior to mid-term dismissal. These states and the statutory provisions are as follows:

Colorado: Colo. Rev. Stats. §§ 123–18–10-17 (Supp. 1967)
Massachusetts: Mass. Ann. Laws, ch. 71, §§ 42-43 (1971)
Mississippi: Miss. Code Ann. § 6282-26 (Supp. 1971)
Montana: Mont. Rev. Code §§ 75-2401, 75-2411 (1962, Supp. 1969)
North Carolina: N. Car. Gen. Stats. §§ 115-67, 115-145 (1966)
Oklahoma: Okla. Stats. tit. 70, §§ 6-1, 6-2, 6-24 (1961, Supp. 1970)
Vermont: Vt. Stats. Ann., tit. 16, § 1752 (1968)
Wyoming: Wyo. Stats. §§ 21.1–155-58, 21-1–160 (Supp. 1969)

Three other states require only a statement of reasons before dismissal of the nontenured teacher, but no hearing:

Illinois: Ill. Rev. Stats., ch. 122, § 24-12 (1965)
Kansas: Kan. Stats. Ann., ch. 72, §§ 5403-07 (1964, Supp. 1969)
Louisiana: La. Stats. Ann., tit. 17, §§ 443, 461-62 (West 1963)

The hearings provided by the state statutes generally are trial-type in character. The most detailed safeguards are required in Alaska, California and Washington. Alaska, for example, requires that the hearing be under oath or affirmation, that the teacher have the rights to cross-examination, to be represented by counsel and to subpoena any adverse witnesses, as well as that a record of the hearing be made, that a copy of the record be furnished at cost upon the teacher's request, and that findings of fact and conclusions of law be made. California additionally requires that the hearing be conducted by a third party—a hearing officer who shall prepare a proposed decision containing findings of facts and a determination as to the sufficiency of the cause or a recommendation as to the disposition of the case, which is then submitted for decision to the governing board. Washington permits the hearing to be held either before a state superior court as an original matter or before the board of education with the rights of appeal for a *de novo* hearing before the superior court.

Other states, such as Arkansas and North Dakota, while providing similar safeguards, usually hold the hearings in private unless otherwise agreed upon by the parties. Alaska and Washington also permit the hearings to be private at the option of the teacher.

In addition to the statutory requirements for hearings, NEA's Research Memo reprinted in the Appendix to this brief shows that many school systems hold hearings as a consequence of school board policy or negotiated agreement (App. 2a-3a).[40]

[40] Just as respondent, NEA does not attempt here "to delineate the precise attributes which a due process hearing should possess" Resp. Br. 29 n.17), but endorses "the general conclusions of court below" with respect to those various attributes (*id.*). With respect to the question of the need for an "impartial tribunal," NEA believes that the Board of Regents, having already made a formal determination not to renew Sindermann's contract, could not impartially sit to review its own determination. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Cultross v. Weaver, C.A. No. 71-C-75; W.D.

Thus, a requirement of a statement of reasons and a hearing is not an "unfamiliar obligation" in many school districts and has clearly not proved to be an unmanageable administrative burden. Rather, to paraphrase the First Circuit in *Drown* (435 F.2d at 1185), the fact that a considerable number of states and local school districts presently require their school boards to provide a hearing, as well as a statement of reasons, in cases of contract nonrenewal is evidence of the workability of such a requirement. If such procedural requirements are feasible at the elementary and secondary school levels, surely they are workable at higher educational levels where the number of teachers is perceptibly smaller.

Wisc., July 23, 1971: "I think it is a very serious question whether the reviewing tribunal may be identical to the tribunal which has previously arrived at a formal operative decision on the merits." (Slip. Op. 7). This is especially so since Sindermann opposed the Board's stated positions. *Cf.* Pickering v. Board of Educ., 391 U.S. 563, 578 n.2 (1968). NEA further agrees that a school board, as an employer, "can never act as an impartial tribunal when called upon to resolve employer-employee conflicts" (Resp. Br. 46 n.32). In this regard, it is significant to note that appropriate alternatives are available and are being utilized. As found by NEA's Research Division in its Research Memo on *School-Board Procedures* (App. 4a):

> "[O]f interest is the sizeable number of school systems utilizing third parties to hear and determine contract nonrenewal cases. . . . [I]n one-fourth of the reporting school systems, the hearings are or can be held before a third party and in 15.6 percent of the systems, the third party determines or can determine the nonrenewal issue."

For a survey of the use of third parties for adjudicating the rights of of tenured teachers in eight states—California, Colorado, Nevada, New Jersey, New York, Oregon, Texas and Washington—*see* NEA Research Div., *Provisions in Tenure Laws for Impartial Hearing Tribunals*, 49 NEA Research Bull. 20 (1971).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the respondent's brief, the Fifth Circuit's judgment on the substantive issue should be affirmed. With respect to the procedural due process issue, NEA agrees with respondent (Resp. Br. 52-53) that "this Court should hold that Sindermann was unconstitutionally denied a hearing prior to non-renewal, and that the remedy therefor should be reinstatement and back pay without consideration of whether the non-renewal was substantively justified" (*see* Resp. Br. 46-50).

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APPENDIX

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RESEARCH MEMO 1971-27 September 1971

SCHOOL-BOARD PROCEDURES UPON NON-RENEWAL OF TEACHERS' CONTRACTS

DO SCHOOL BOARDS provide hearings for teachers, including nontenure teachers, when employment contracts are not renewed? Do the school-board procedures provide for a statement of reasons for nonrenewal of contracts? Are teachers given an opportunity to resign before and/or after formal notice of nonrenewal? These questions are among the many and varied items related to programs and administrative practices of public school systems in the United States contained in the quinquennial survey conducted in May 1971 by the NEA Research Division.

The 1971 survey covers the estimated 11,717 public school systems in the country with an enrollment of 300 or more pupils. Questionnaires were mailed to a stratified sample of public school systems of this size. In view of the omnibus nature of the survey, the replies to the many and varied questions are being tabulated gradually and the results are being released in segments. Highlighted here are the survey findings on school-board procedures associated with the nonrenewal of teaching contracts. This report includes responses from just over 70 percent of the queried systems.

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The responses were proportionally weighted to give an approximation for the estimated 11,717 school systems in the United States enrolling 300 or more pupils.

* * * * *

Authority for Hearings

The responding systems which affirmatively reported that hearings are provided for all or some of their teachers were asked to indicate by what authority the hearings are made available. The answers to this question are summarized in Table 1. As may be seen, statutory mandate is identified by 86 percent of the reporting systems as the mainspring of authority for the hearing to tenure teachers. This statutory source is reflected as well in those systems which, for tenure teachers, reported that the authority stems from negotiated agreements between school employers and teachers associations or school-board policy.

On the other hand, school-board policy is overwhelmingly the source of authority by which hearings are provided to nontenure teachers in systems reporting separate authority for hearings for tenure teachers and nontenure teachers. In this group of school systems, 4 in 5 (78 percent) indicated that hearings are provided as a matter of board policy, while 15.8 percent indicated that hearings are provided by negotiated agreement.

In systems where hearings are available to all teachers, the authority stems from statute in almost half (47.4 percent) of the systems in this group while school-board policy accounts for 40.7 percent.

Statement of Reasons for Nonrenewal of Contracts

The survey sought to learn whether a statement of reasons is furnished to teachers whose contracts will not be renewed. The findings appear in Table 2. Two-thirds of the systems in Group 1 (those reporting identical hearing procedures for all teachers) said they always give the teacher a statement of reasons for not renewing the contract; slightly less than 30 percent said a statement is given if

requested by the teacher. In Group 2 (those having procedures for tenure teachers only or having separate procedures for tenure teachers and nontenure teachers) 84 percent indicated that tenure teachers are always told why their contracts are not being renewed while 13 percent reported that tenure teachers receive a statement on request. In Group 3 (those with separate policies for nontenure teachers) almost three-fifths of the systems reported that they give a statement of reasons for nonrenewal of contract to the nontenure teacher upon request.

Availability of Hearings

To discover whether hearings are automatic or are available only upon request of the teacher, the school systems were asked to identify what procedure they followed. Table 3 depicts the results. This table shows that in 4 in 5 systems (79.1 percent) in Group 1 a hearing is held only if requested by the teacher, while almost 20 percent always hold hearings for teachers whose contracts are not being renewed. In Group 2 just over half of the systems provide a hearing upon request of the teacher and a slightly smaller number (46.7 percent) always provide a hearing. In Group 3, 4 in 5 systems provide a hearing if the nontenure teacher asks for one; the remaining systems in this group (19.5 percent) do not accord hearings to nontenure teachers.

Hearing Unit and Decision Maker

Two other facets of the hearing procedure were queried. First, if a hearing is provided in contract nonrenewal situations, before whom is the hearing held? The survey produced these findings:

Hearing unit	Percent of reporting systems
School board only	68.6%
Third party only	18.6
School board or third party (both procedures may apply)	6.1
Not reported	6.7
Total	100.0%

Second, who makes the determination in the case? The responses to this question were as follows:

Determination unit	Percent of reporting systems
School board only	76.9%
Third party only	5.2
School board or third party (both procedures may apply)	10.4
Not reported	7.5
Total	100.0%

While only the school board is the hearing tribunal and the decision maker in a great majority of the school systems, of interest is the sizeable number of school systems utilizing third parties to hear and determine contract nonrenewal cases. As the figures above show, in one-fourth of the reporting school systems, the hearings are or can be held before a third party and in 15.6 percent of the systems, the third party determines or can determine the nonrenewal issue.

Resignation Procedures

School systems were also asked to indicate what is the usual procedure on resignations before and after formal notice to teachers that their contracts will not be renewed on expiration. The survey results lined up this way:

Usual resignation procedure	Before formal notice to teacher	After formal notice to teacher
Allow teacher to resign at his request	42.8%	21.9%
Recommend to teacher that he resign	47.0	18.3
Resignation not permitted	0.8	6.8
Not reported or not applicable	9.4	53.0
Total	100.0%	100.0%

These data show that in 9 in 10 school systems teachers are given a chance to resign in advance of formal notice of

contract nonrenewal, whether the opportunity to resign is self-initiated or on recommendation of the school authorities. Although there is less opportunity to resign after formal notice is given to the teacher, 4 in 10 school systems still permit resignations at this stage.

* * * * *

TABLE 1.—AUTHORITY FOR PROVIDING HEARINGS TO TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Authority	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
Statute	47.4%	85.9%	6.2%
Negotiated agreement	11.9	7.5	15.8
Board policy	40.7	6.6	78.0
	100.0%	100.0%	100.0%

TABLE 2.—STATEMENT OF REASONS GIVEN TO TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Statement given?	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
No	5.3%[a]	3.0%[a]	37.9%
Yes, always	66.2	84.0	3.8
Yes, if requested	28.5	13.0	58.3
	100.0%	100.0%	100.0%

[a] These negative responses appear to be inconsistent with statutory rights of tenure teachers to a statement of reasons and a hearing when dismissal is being considered during or at the end of the school year. A possible explanation is that the process of annual renewal of contract does not apply to tenure teachers; hence, a negative response was given.

TABLE 3.—HEARINGS HELD FOR TEACHERS WHOSE CONTRACTS WILL NOT BE RENEWED

Is hearing held?	Percents of school systems reporting		
	Group 1. Systems having identical procedures for *all teachers*	Group 2. Systems having procedures for *tenure teachers only* or separate procedures for *tenure teachers*	Group 3. Systems having separate procedures for *nontenure teachers*
1	2	3	4
No	2.0%[a]	2.4%[a]	19.5%
Yes, always	18.9	46.7	0.0
Yes, if requested	79.1	50.9	80.5
	100.0%	100.0%	100.0%

[a] These negative responses appear to be inconsistent with statutory rights of tenure teachers to a statement of reasons and a hearing when dismissal is being considered during or at the end of the school year. A possible explanation is that the process of annual renewal of contract does not apply to tenure teachers; hence, a negative response was given.